



MEMORANDUM

To: President Craig Blair, Chair
Speaker Roger Hanshaw, Chair
Joint Committee on Government and Finance

cc: Brian Abraham, Chief of Staff
Ann Urling – Deputy Chief of Staff
C. Edward Gaunch, Cabinet Secretary, West Virginia Department of Commerce
Todd Hooker, Executive Deputy Director, West Virginia Department of Commerce
Mitch Carmichael, Executive Director, West Virginia Development Office

From: West Virginia Office of Energy

Date: April 15, 2021

Re: Quarterly Report Ending March 31, 2021
Legal Challenges Potentially Impacting the Energy Industry

As mandated by West Virginia Code §5B-2F-2(s), the following information presents legal challenges with the potential to impact the state's energy industry. This submission was prepared by Amy Smith, Steptoe & Johnson PLLC. Reports are submitted on a quarterly basis.

FIRST QUARTER 2021
REPORT TO THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE
PURSUANT TO WEST VIRGINIA CODE § 5B-2F-2(q)

On February 24, 2021, the Supreme Court of Appeals of West Virginia issued an opinion which reversed and remanded a circuit court judgment and held that a counterclaim based on statements made during a FERC proceeding was barred by the litigation privilege and *Noerr-Pennington* doctrine. *Smith v. Chestnut Ridge Storage, LLC*, 855 S.E.2d 332 (W. Va. 2021). At dispute was the assignment by owners of an oil and gas estate to a company for a storage project. *Id.* The owners filed suit against the company alleging breach of the assignment and seeking declaratory judgment. *Id.* The company filed a counterclaim alleging, among other claims, breach of the assignment, which was based in large part on the owners' opposition to a FERC certificate of public convenience and necessity relating to the storage project. *Id.* The circuit court denied a motion for summary judgment by the owners, which asserted that the company's counterclaims were barred by the litigation privilege. *Id.* On appeal, the Court reasoned that the FERC proceeding was a quasi-judicial proceeding, that intervenors may assert litigation privilege immunity, and that the counterclaim was based solely on statements made by the owners during the FERC proceeding. *Id.* The Court further concluded that the owners were entitled to immunity from the counterclaim under the *Noerr-Pennington* doctrine, which provides immunity to those engaged in petitioning activities. *Id.*

On March 11, 2021, the United States Court of Appeals for the Fourth Circuit vacated the North Carolina Department of Environmental Quality's ("NC DEQ") decision to deny a Clean Water Act ("CWA") certification to an extension of the Mountain Valley pipeline project, which runs from northwestern West Virginia to southern Virginia. *Mountain Valley Pipeline, LLC v. North Carolina Dep't of Env't. Quality*, 990 F.2d 818 (4th Cir. 2021). Specifically, the Court determined that the NC DEQ did not explain why it disagreed with a hearing officer's findings

that the project “fully minimized” its potential impacts on surface waters and that the agency did not explain why it chose to deny a certificate for the extension project without offering to condition such a permit on the main project receiving all its own permits. *Id.* The Court held that some, but not all, of the bases for the government agency to deny CWA certification were arbitrary and capricious, in violation of the Administrative Procedure Act. *Id.*

On March 16, 2021, the Supreme Court of Appeals of West Virginia issued an opinion which reversed and remanded a circuit court judgment and held that the West Virginia Department of Environmental Protection (“WV DEP”) was entitled to qualified immunity for alleged negligence in enforcing the West Virginia Surface Coal Mining and Reclamation Act (“SCMRA”). *West Virginia Dep’t of Env’t. Prot. v. Dotson*, No. 20-0063, 2021 WL 973925 (W. Va. Mar. 16, 2021). The matter arose from severe flooding of a creek in McDowell County. *Id.* Plaintiffs sued the WV DEP and Twin Star Mining, Inc. (“Twin Star”), claiming that the property damages from the flooding were caused by the negligence of those entities. *Id.* Specifically as to the WV DEP, Plaintiffs alleged that it was negligent in failing to enforce provisions of SCMRA by issuing permits to Twin Star based upon designs that failed to comport with SCMRA requirements and that it allowed Twin Star to violate SCMRA without issuing a Notice of Violation. *Id.* The circuit court denied the WV DEP’s motion for summary judgment, which asserted the public duty doctrine and qualified immunity. *Id.* On appeal, the Court concluded that the processes or functions of determining whether the information contained in a permit application satisfies statutory requirements under SCMRA and by which the WV DEP gathers facts on evidence of alleged SCMRA violations are ultimately discretionary functions. *Id.* Therefore, the Court determined that the WV DEP’s alleged acts or omissions did not violate clearly established statutory or constitutional rights or laws and accordingly the WV DEP was entitled to qualified immunity. *Id.*